In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR, v. ARTHUR LYNAH ET AL. } No. 45

THE UNITED STATES, PLAINTIFF IN ERROR, v. CHARLES A. WILLIAMS AND AMELIA S. Williams. } No. 59.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These are actions brought under the provisions of the act of Congress of March 3, 1887 (c. 359, 24 Stat. L., 505), "An act to provide for the bringing of suits against the Government of the United States;" and are based upon an implied contract on the part of the Government to make compensation for the alleged taking for public use of lands, the private property of the plaintiffs.

The cases were tried by the court without a jury.

The facts, which are substantially the same in both cases, are stated, with full detail, in the findings of facts made by the court. (Tr. No. 45, pp. 6–9; Tr. No. 59, pp. 8–10.) They are, in short, as follows:

The plaintiffs, defendants in error, are the owners of plantations on the Savannah River, in South Carolina, portions of which, fronting on the river, have been in cultivation for a long period of time as rice plantations, and solely for that purpose. They derive title by proper mesne conveyances from "a grant by the lords proprietors of South Carolina," made in the one case in 1736, in the other in 1738.

These lands have been "reclaimed" by drainage and the erection of dikes or banks; they were dependent for irrigation upon the waters of the Savannah River, and ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands and were then drained therefrom, which were adapted to the natural level of the river, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of that stream through and over its natural channel along its natural bed to the waters of the ocean, and the maintenance of the natural level of the waters of that river.

They were protected by embankments, through which trunks or waterways were constructed with flood gates, which trunks were placed in such embankments so that the bottoms were above the mean low-water mark. Through these the lands were irrigated and drained, and were dependent upon the natural

rise and flow of the tide to effect this drainage. It is absolutely necessary for the production of rice that the fields should be thus flooded and drained.

For several years the United States Government has been making, erecting, and maintaining structures in the Savannah River, beginning at points below these plantations, and in dumping mud and sand dredged from the Savannah River proper into the Savannah Back River below these plantations, tending thereby to stop up said river and decrease the natural flow and current thereof. By reason of these obstructions and works the natural flow of the river has been changed, and its waters have been kept back and flowed back and lifted above the natural level of the river in its natural bed.

The direct effect of these works is to raise the level of the river at these plantations, causing the water to lie, remain, and be upon the plantations without being capable of being drained off. The flooding is now a permanent condition, and the plantations reduced to bogs, unfit for the cultivation of anything, and of no value. Plaintiffs have been compelled to abandon the cultivation of these plantations.

The gradual result was begun to be felt when the cross-tides dam between Hutchinsons Island and Argyle Island was built in 1885, the same having been completed in 1890, and has grown worse with the continuing erection of obstructions and dumping of material, and the continued seepage and percolation, by which the lands became gradually more sodden,

boggy, and sour, and incapable of producing rice, the only system of cultivation of which the land is capable. The claimants were finally driven away and forced to abandon the plantation in 1895.

Beyond the backing up of the water on the plantations by reason of the obstructions and works of the Government, and the holding back of the waters brought down by the freshets, and the invasion of the land by the superadded water, the Government does not use the lands for any purpose, nor is it in possession of them.

These obstructions and dams and structures were erected, and all the work in and about the Savannah River was done, to improve the navigability of that river. The plantations involved in these suits were above the works on the river, and the works do not rest upon or touch the lands of plaintiffs. Of the premises described in case No. 45, *United States* v. *Lynah*, the portion alleged to have been taken in the manner above described, fronting on the river and dedicated to the culture of rice, extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment. (Tr., p. 16.)

And in the case of *Williams* v. *United States*, No. 59, the portion of the plantation alleged to have been taken is on the fresh tidal waters of the Savannah River, the surface of which lies between high and low water. This was granted by the lords proprietors of South Carolina in 1738 and the grant thereafter con-

firmed by act of the legislature of South Carolina. It has been for over a century protected from the river or any invasion of tidal water by an embankment and cultivated in rice, and was so cultivated by the plaintiffs since their ownership of the said plantations in 1876 up to the time of the abandonment thereof. (Tr., p. 13.)

Upon these facts the court announced these conclusions of law:

> I. The cause of action accrued within six years of the commencement of this action.
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> II. The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, subject to the fifth amendment. (*Monongahela N. Co.* v. *United States*, 148 U. S., 336, 337.)
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> III. Every riparian proprietor whose lands lie on a navigable water of the United States holds these lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.
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> IV. If, therefore, such riparian proprietor suffer damage incidental to or consequential upon such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor; and can not, under the fifth amendment, demand compensation, unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (*Gibson* v. *The United States*, 166 U. S., 269.)

V. That portion of the plantation fronting on the river and dedicated to the culture of rice extended almost up to, if not quite to, low-water mark, and a large part of it was between mean high-water mark and low-water mark, protected from the river by an embankment. The facts found show that by reason of the obstruction in the Savannah River the water had been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The Government does not in a sense take this land for the purpose of putting its obstructions on it; but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the Government that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. "It would," says Mr. Justice Miller, "be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law

on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use." (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 177, 178.) In that case the backing up of water on land was held to be a taking.

VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the Government dams and obstructions backing up the water of the Savannah River and raising the water level at and in the rice plantation and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value, makes the action of the Government a taking of lands for public purposes within the meaning of the fifth amendment, for which compensation is due to the plaintiffs. (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 182; *Mugler* v. *Kansas*, 123 U. S., 668.)

VII. The Government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by

this public work and fulfilling its purpose the water in the Savannah River has been raised at the plaintiff's plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation, and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes, for which compensation must be provided. (*Pumpelly* v. *Green Bay Co.*, 13 Wall., 181.)

VIII. The plaintiffs are entitled to just compensation for the taking of the —— acres of rice land. This is estimated to be —— thousand dollars, the value of the land so taken, for which amount let the plaintiffs have judgment.

Judgments were entered for the plaintiffs and the United States brings these writs of error.

The following assignments of error were filed in the court below. (They are substantially the same in both cases.)

I. The court erred in holding that the cause of action first accrued within six years of the commencement of this action.

II. The court having found, as a matter of fact, that the Cross Tides dam, the principal Government work complained of in this action, was completed in 1890, and that this action was commenced on the 22d day of March, 1897, the court erred in failing to hold that the alleged cause of action first accrued more than six years before the commencement of this action.

III. The court erred in holding that the direct result of the Government works of improvement in the Savannah River is an actual and practical ouster of plaintiffs from their possession of the rice plantation in question.

IV. The court erred in holding as follows: "The facts found show that by reason of the obstructions so placed in the Savannah River, and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation and forced on the land, the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and in addition thereto holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same, by all of which the plantation has been rendered absolutely valueless; all of which is the result of the Government improvements and works, without which its purposes could not be carried out and effected. This is a taking within the meaning of the fifth amendment."

V. The court erred in holding that the erection and maintenance of Government works in the bed of a navigable tidal river, for the improvement of the navigation thereof, whereby the water in said river is backed up against the banks of a rice plantation lying on said river, and destroying the drainage thereof, amounts to a taking of said plantation for public use.

VI. The court erred in holding that a riparian owner of rice lands, dependent for their irrigation and drainage upon the natural flow of the waters of a tidal river, is entitled to compensation by the Government under the fifth amendment to the Constitution for damages arising from the construction and maintenance of Government works for the improvement of navigation of said river, erected and maintained wholly within the bed of said river, by which the mean low-water level of said river is raised and the natural drainage of said lands destroyed.

VII. The court erred in holding as follows: "The plantation of the plaintiffs being actually invaded by the superinduced addition of the water directly caused by the Government dams, obstructions, and works backing up the water of the river, and raising the water level at and upon and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for the cultivation of rice or of any other known article; and plaintiffs having been compelled thereby to abandon their plantation, and being practically ousted of possession, and this being a permanent and continued condition, and the plantation being thereby rendered irreclaimable and become of no value, renders the action of the Government a taking of land for public purposes, within the meaning of the fifth amendment to the Constitution, for which compensation is due to the plaintiffs."

VIII. The court erred in holding that the property of the plaintiffs has been taken by the Government for public use.

IX. The court erred in holding as follows: "The plaintiffs are entitled to just compensation for the taking of —— acres of land."

X. The court erred in holding that the plaintiffs are entitled to recover upon the facts found by the court in this action.

XI. The court erred in failing to hold that the intention of the Government in the erection and maintenance of the works of improvement in question was only to improve its own property, and not to acquire the property of another.

XII. The court erred in failing to hold that plaintiffs' title to the rice land lying between high and low water on a tidal river was subservient to the right of the Government to cause the waters of said river to be held back thereon for the benefit of navigation, without compensating the owners for damagas resulting therefrom.

XIII. The court erred in failing to hold that the damages resulting from the prosecution of this improvement of a navigable highway for the public good was not the result of a taking of plaintiffs' property, and was merely incidental to the exercise of a servitude to which the property has always been subject.

XIV. The court erred in failing to hold that the complaint should be dismissed, with costs to the defendant.

ARGUMENT.

It is stated in the findings of fact in these cases that these plaintiffs held title under sundry mesne conveyances connecting their title with grants by the lords proprietors of South Carolina; in the one case a

grant made in 1736, in the other, a grant made in 1738. In the case of the latter grant (and presumably in the other) it is found that the grant was thereafter confirmed by act of the legislature of South Carolina. (Tr. No. 59, p. 13.)

The charters of South Carolina were granted by Charles II in 1663 and 1665. These charters were surrendered to the King, George II, in 1729, and the government of Carolina became regal; and the province was divided into North and South Carolina by an order of the British Council, which fixed the boundaries between the two provinces. (1 Stat. L. South Carolina (Cooper), 22–41.)

All grants previously made by the lords proprietors were made valid in South Carolina in 1731. (Rev. Stat. South Carolina, 1893, sec. 1873.) This is the confirmation, it is supposed, which is claimed to confirm the grant from which the Williams's title is derived. Although it may not be material in the determination of the rights of the plaintiffs in these cases, this statute does not affect the grants relied on, which were made, according to the findings, several years before its passage. However, the grants, whether from the lords proprietors or the Crown, would be of the same and equal extent.

Upon the application for an amended or additional finding of fact by counsel in the Williams case, No. 45, that the lands involved were between high-water mark and low-water mark on the river, the learned circuit judge, in the opinion making the finding, says:

"It may be well to remark that no finding on this point would have affected the conclusion of law reached by the court. The findings of facts show that plaintiffs and their ancestors had been in the actual, exclusive, pedis possessio of all this land, high land, and rice land, down to the embankment of the river at low-water mark, holding under a grant from the English Crown. This long continued, actual, adverse possession would give a complete title as against the world." I presume this is not intended to set up a title by adverse possession as against the State or the United States, or by prescription or usage; for the findings expressly state there was a grant from the lords proprietors, from which, through mesne conveyances, the premises came to the possession of the plaintiffs.

The grants are not set out in the findings. But in the petition, in the Lynah case, No. 45, the lands are described as follows: "All the plantation or tract of land called Vernezobre, situate, lying, and being on the Savannah River, in St. Peters Parish, Beaufort district, and State aforesaid, butting and bounding to the north on land of the late John M. Chisolm and Elliott Guerard; to the east on lands formerly of —— Brisbane; *to the west on Savannah River*, lands of Elliott Guerard and Daniel Heyward, esq.; to the south on lands of Daniel Heyward, Elliott Guerard, and Pringle Smith, esqs., measuring and containing two thousand one hundred (2,100) acres, more or less." (Tr. No. 45, p. 2.) The map annexed to the petition (p. 12) shows the tract lying on the river, which is

mentioned as the rice plantation, marked No. 1. The description is manifestly taken from the deed to the immediate ancestor of the plaintiffs. If this description is that of the grant, then the original grantees did not take any shore, or land between high-water and low-water mark, by the laws of England, for the water boundary was "on Savannah River," and the grant extends only to high-water mark. The same rule obtains in the United States, and is established in South Carolina. (*United States* v. *Pacheco*, 2 Wall., 587; *State* v. *Pinckny*, 22 S. C., 484, 507.) So that, if there was confirmation, the extent of the grant remains the same.

These suggestions apply to both cases, Nos. 45 and 59. In view of the findings of facts as to the grant, and that no allusion was made to the expressions and enumerations thereof in the court below, it may be held that the grant included the shore lands. I will, therefore, in the further argument treat it thus. I have alluded to the matter, not for the purpose of evading the broad propositions presented, but, in caution, against any presumption founded upon long and uninterrupted possession.

II.

The charters of Carolina were similar to that granted to the Duke of York for New Jersey; and, in the language of *Martin* v. *Waddell*, did not differ materially from it in the terms in which the bays, rivers, and arms of the sea, and the soils under them, were conveyed to the grantees.

In *Shively* v. *Bowlby* (152 U. S., 1, 13) Justice Gray, delivering the opinion of this court, says:

> In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark is in the King, except so far as an individual or a corporation has acquired rights in it by express grant or by prescription or usage (citing numerous authorities); and this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing (and authorities).
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> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

And in the case of *Morris* v. *United States* (174 U. S., 196,226), Justice Shiras, speaking for the court, referring to the property in the soil under navigable waters, epitomizes the conclusions of the former cases, saying they decided—

> that the various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; that by those charters the dominion and propriety in the navigable waters and in the soils under them passed as part of

> the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community about to be established, as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property to be parceled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the National Government by the Constitution of the United States; that when the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government.

There can be no doubt that, in England, a subject may be owner of a portion or tract of shore, by ancient charter or grant. (*Hall, Sea Shore*, 15; Hale, *de jure* Maris, Hay, L. T., c. V.; 5 Co., 107.)

And so, as we have seen above, in this country the individual may be owner of a portion of shore by grant from the State.

But the subject or individual takes this ownership, whether from the Crown or the State, subject to the trust, which can not be destroyed or diminished.

> It is the settled law of this country that the ownership of and dominion and sovereignty

over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the permanent right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. * * *

When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country the limitation and all its incidents were discarded. So, also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide water is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by

the tide. (*Illinois Central R. R.* v. *Illinois*, 146 U. S., 387, 435.)

And, further, as to the character of the State's title thus granted, the court said (p. 452):

> It is a title different in character from that which the State holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the States. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake.

> Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public and which can only be discharged by the management and control of property in which the public has an interest can not be relinquished by a transfer of the property.

It is undisputed that the title to the shores of the sea and adjacent lands covered by water is in the States. "What is equally true," as Mr. Justice Bradley said in *Stockton* v. *Baltimore & N. Y. R. Co.* (32 Fed. Rep., 9, 19), is "that, after the conquest, the said lands were held by the State, as they were by the King, *in trust* for the public use of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large."

In South Carolina the rule is stated:

> The State had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum*, consisting of the rights, powers, and privileges derived from the British Crown, and belonging to the governing head, which she held in a fiduciary capacity for general and public use; in trust for the benefit of all the citizens of the State, and in respect to which she had trust duties to perform. (3 Kent, 377; *Martin* v.

Waddell, 16 Peters, 367; *Commonwealth* v. *Roxbury*, 9 Gray, 451.

(*State* v. *Pacific Guano Co.*, 22 S. C., 48, 83.)

III.

The extent and character of the title by the grant from the Crown is clearly shown by reference to *Attorney-General* v. *Parmeter* (10 Price, 378). It was an information complaining of a nuisance in the harbor of Portsmouth. The defendants had inclosed with wooden piles a parcel of mud land between high and low water marks, which land was used for a timber pound, and had built upon the same a wharf or quay. The information alleged, which was admitted, that the King had granted, by letters patent, all and singular the lands and marshes surrounded and overflowed, or subject to the overflowing of the sea, to certain persons from whom the defendants claimed by purchase, the lands in question, in the harbor. And it also alleged, among many other things, that if such parts of the harbor had been ever granted by the Crown to any person or persons, under whom the defendants claimed, yet that such grant did not and could not extend to deprive His Majesty or his subjects of the free use and enjoyment of such parts of the said harbor or the free passage, repassage and anchorage, mooring and lying of all ships and vessels, etc. The defendants, by their answer, after admitting the prerogative of the Crown, claimed they were in the possession as the absolute owners in fee simple, that the buildings were erected by them at their expense, and

that the fee simple and inheritance of the land had been purchased by them for a valuable consideration.

Macdonald, Ch. B., delivered the judgment of the court. In the opinion, he said (p. 401):

> Now I take it that nothing can be clearer than that the King can in no degree affect the public right of the subject passing and repassing upon the salt water: he can not affect that by anything which can be done by him. Lord Hale lays down clearly *that ports, creeks, and havens are the subjects of the public right;* he describes what those are—a port, more immediately accommodated for protection, both naturally and artificially; a haven, that which does naturally protect, and where ships may ride or lie in safety, and a creek, a member of a port where there is no customer or comptroller, but where are certain officers for the purpose of collecting the King's revenues. In none of these places, therefore, can the public right be waived, although there might be a grant of the soil; but such grant must be considered as subject to that public right, which can not be disturbed.
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> Perhaps I might stop here at once and say, if in point of fact these ports and creeks, and part of the port of Portsmouth, is comprehended in the grant, that is by no means what the Crown could grant, so as to affect the jus publicum, which is the right of the subject universally. (*Supra*, p. 405.)

Lord Hale also says, De Jure Maris, cap. 6, page 36:

> That a subject may, by usage or prescription (of course, by grant), be owner or proprietor of

such an arm of the sea, creek, or particular portion of the sea contiguous to the shore, as is not a public port or haven.

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Second. That the people have a public interest, *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances, or impeached by exactions, as will be shown when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

The grants to the plaintiffs in these cases, as we have seen, must have been from the Crown, as they were made in 1736 and 1738, after the surrender of the charters.

IV.

The inquiry in these cases is, at the threshold, the extent of the power granted to Congress, by the Constitution, to regulate commerce.

It is to be remembered that the Government has not taken possession of these lands by the erection of structures upon them or physically entering upon them. Even had they done so, my position is that this would have been within its power and competency to accomplish the purpose, under the direction

of Congress, of improving the navigability of the Savannah River.

This power, said Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 196:

> Like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms and do not affect the questions which arise in this case. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

In *Hoboken* v. *Railroad Co.* (124 U. S., 656) the court said:

> Over these lands it (the State) has absolute and exclusive domain, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce.

In *Mobile* v. *Kimball* (102 U. S., 691, 696) the court said:

> That power (the commercial power of Congress) is, indeed, without limitation. It authorizes Congress to prescribe the conditions upon

> which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries, and between the citizens of the several States, and to adopt measures to promote its growth and insure its safety. And, as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting all the States; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to their official circumstances and localities. * * *

The improvement of harbors, bays, and navigable rivers, building of piers, wharves, etc., erection of dams, come within the regulation of commerce. (*Mobile* v. *Kimball, supra; Stockton* v. *Railroad, ut sup.*)

Congress has power to order obstructions to be placed in the navigable waters of the United States. It may build light-houses in the bed of the stream. It may construct jetties. (*Gilman* v. *Philadelphia*, 3 Wall., 724; *South Carolina* v. *Georgia*, 93 U. S., 4; *Telegraph Co.* v. *Telephone Co.*, 96 U. S., 1.)

I have said this much, possibly being subject to the criticism of prating over familiar and undisputed declarations of interpretation of the grants of the Constitution, because of the limitations which the arguments

of the counsel for the defendant in error, accepted by the learned circuit judge, seek to impose upon the exercise of this power. The force—the weakness, if you please—of this position is shown when we reflect that this limitation would equally apply to all grants made to the General Government. These powers must be complete; they can not be fettered, or cribbed, or confined. The greater or lesser extent of disability is of no difference.

The power in the United States includes "all the powers which existed in the States before the adoption of the Constitution." Whatever consequences follow in its exercise are to be provided for exactly as they had been or would be in the British Isles or in the States of the Union.

In the exercise of this power, as in all other instances, there can not be any conflict or friction with rights asserted and defined in other parts of the Constitution and its amendments. The great work of the founders of the Republic stands fully orbed; and the amendments, born of jealous caution, are in perfect harmony with the original design. There is nothing discordant; nothing doubtful. So that, while it has been often and discriminatingly said that a distinguishing peculiarity of this great establishment was the protection, by careful enunciation, of the rights of the individual man, yet, underlying all the provisions, is the recognition of the superior welfare of the body of the people. We, the people, for ourselves and our posterity ordain and establish this Constitution.

One of the primary objects, as has been so often stated, was to regulate commerce, and, in doing so, to reach out and absolutely control navigation and all the navigable waters of the country for the benefit of the people. When this court said, in *Martin* v. *Waddell*, that the sovereign people of each State hold the absolute right to all their navigable waters, and the soils under them, for their own common use subject only to the rights since surrendered by the Constitution to the General Government, and that the grants made by their authority must be determined by different principles from those which apply to grants of the British Crown; it was not meant, simply, that the people, through their representatives, could arbitrarily dispose of the trust property. That is not the theory of representative government. That would not be tolerated long in a fierce democracy.

The circuit court, in its conclusions of law, recognizes, to a degree, the principles I speak of. The judge says:

> The Government of the United States, in undertaking this improvement of the navigation of the Savannah River, was and is exercising its lawful power in its right to regulate commerce, *subject to the fifth amendment.* Every *riparian* proprietor whose lands lie on a navigable river of the United States holds those lands with notice that the Government has the right to improve the navigation in such a mode as it deems most advisable.
>
> If, therefore, such *riparian* proprietor suffer damage incidental to or consequential upon

> such improvement, he can not under any circumstances treat the Government as a trespasser or tort feasor, and can not, under the fifth amendment, demand compensation unless there is an actual physical invasion of and taking of his land for the public purpose—a physical invasion of the real estate of the private owner and a practical ouster of his possession. (The italics are mine.)

The court then found, it being a question of law and fact, that there had been such a taking of the land as entitled the parties to compensation. Reliance for this conclusion was had upon the principles laid down by this court in the cases of *Monongahela N. Co.* v. *United States* (148 U. S., 336–337); *Gibson* v. *United States* (166 U. S., 269); and explicitly, *Pumpelly* v. *Green Bay Co.* (13 Wall., 181).

These cases do not sustain the contention of the plaintiffs, the defendants in error.

Pumpelly v. *Green Bay Co.* was an action of trespass on the case. The plaintiff was the owner in fee simple of a tract of fast land. There was no question of a superior or other title. The point decided was that a serious interruption to the common and necessary use of private property, by reason of authorized works for public use, was a *taking* which entitled the owner to compensation. But the title of this owner was absolute, unfettered, unembarrassed. There was involved no prerogative right—no trust for the public use.

The *Monongahela Navigation* case is not at all of authority against my positions. The essential feature

of that case is that where, under the authority of the State, extensive and expensive improvements had been made by a corporation, representing the interests and the property of many citizens, for the purpose and with the effect of improving a navigable river, when the General Government saw fit, in the exercise of its power, to take charge of those works of improvement it should make *just* compensation for *all* it took possession of.

Why invoke *Gibson* v. *United States* (166 U. S., 269)? There can be no clearer statement than is there made:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.

This was said about the charged invasion of land, by the erection of structures in aid of navigation, upon a river where the improvements were many hundreds of miles above the flux and reflux of the tides.

But, away beyond all this, what private property was taken for which compensation should be made under this guarantee of the Constitution, which is only affirmative of a right to the individual in a free government like this? The Crown had property rights in these lands in trust. The State had property rights to these lands in trust. They were never surrendered. They could not be. And when the United States

reached out her hand and took possession of them to execute the trust to which she had succeeded, and which she was *legally* bound to execute, the inferior right had to yield, even to extermination. It is not for the courts to say that the individual has suffered and therefore should be reimbursed or compensated. If he has been, under a mistaken idea of his rights, put to labor and expense and hope, he has a remedy by application to the bounty of a Government which will, it is opined, do him justice. But no wrong has been done him. He has enjoyed these lands and their profits without money and without price. They were the common property of the whole people. The accident of adjacent ownership gave him the license and the privilege; for, in the last instance, it was a privilege.

The case of *South Carolina* v. *Georgia* (93 U. S., 1), came up upon the very same conditions and facts that these cases are here. South Carolina filed her bill in equity against Georgia praying an injunction to restrain that State from obstructing or interrupting the navigation of the Savannah River. The obstructions mentioned were exactly the same as the obstructions complained of by the plaintiffs in these cases. The case was based upon an alleged violation of a compact between the two States, by which it was covenanted that the navigation of the river should forever be equally free to the citizens of both States, and free from interruption; and that Congress had authorized obstructions against the rights of the complaining State. The opinion goes beyond, necessarily,

the simple question. That case was this: Immediately above the city of Savannah the river is divided by Hutchinsons Island, and there is a natural channel on each side of the island, both uniting at the head. The obstruction is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern by increasing the flow of the water through the former, thus increasing its depth and waterway. Mr. Justice Strong, delivering the opinion of the court, said:

> That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government it has been so understood and determined. Prior to the adoption of the Federal Constitution the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream

should pursue a defined course, and that they should pass along one channel rather than another where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions thereon at their will.

* * * * *

The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand bank, or a jetty pushed out into the stream to narrow the waterway and increase the depth of water and the direction and force of the current, or the pier of a bridge standing where vessels now pass and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense obstructions to navigation, but so far as they tend to facilitate commerce it is not claimed they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet

> all except the pier are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

Compare the facts of that case with the facts of these. Suppose the river, instead of having its bed raised by the operations of the Government, had been diverted from its channel altogether. The rice plantations of the plaintiffs—the land between high and low water marks—would have been undoubtedly rendered utterly valueless; because rice could not have been cultivated without the flooding of the lands. This matter was between States. Individual rights were not involved. But can it be that the great power, so carefully considered, can be shorn of its efficacy to favor a comparative individual right?

In this connection I insist that the doctrines clearly laid down in the late case of *Scranton* v. *Wheeler* (179 U. S., 141) are conclusive of these questions. That case was not, however, upon rights of owners upon tide waters and did not treat of the servitude upon shore land. And yet this court, discussing the broad claim of the Government, said:

All the cases concur in holding that the power of Congress to regulate commerce, and therefore navigation, is paramount, and is unrestricted unless except by the limitations upon its authority by the Constitution. Of course, every part of the Constitution is as binding upon Congress as upon the people. The guaranties prescribed by it for the security of private property must be respected by all. But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion; and the judiciary is without power to control or defeat the will of Congress, so long as that branch of the Government does not transcend the limits established by the supreme law of the land. Is the broad power with which Congress is invested burdened with the condition that a riparian owner whose land borders upon a navigable water of the United States shall be compensated for his right of access to navigability whenever such right ceases to be of value solely in consequence of the improvement of navigation by means of piers resting upon submerged lands away from the shore line? We think not. The question before us does not depend upon the inquiry whether the title to the submerged lands on which the new south pier rests is in the State or in the riparian owner. It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." (*Webber* v. *The Pere Marquette Boom Co.*, 62 Mich., 626, and authorities there

cited.) But it is equally well settled in that State that the rights of the riparian owner are subject to the public easement or servitude of navigation. (*Lorman* v. *Benson*, 8 Mich., 18, 32; *Ryan* v. *Brown*, 18 Mich., 196, 207.) So that whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman* v. *Benson*, above cited, the supreme court of Michigan, speaking by Justice Campbell, declared the right of navigation to be one to which all others were subservient. The learned counsel for the plaintiff frankly states that compensation can not be demanded for the *appropriation* of the submerged lands in question, and that the United States under the power to regulate commerce has an

unquestioned right to *occupy* them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention is, that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We can not assent to this view. If the riparian owner can not enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking of private* property for public use, but only a consequential injury to a right which must be injoyed, as was said in the *Yates case*, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation. When erecting the

pier in question the Government had no object in view except, in the interest of the public, to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of international and interstate commerce. In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. The subject with which Congress dealt was navigation. That which was sought to be accomplished was simply to improve navigation on the waters in question so as to meet the wants of the vast commerce passing and to pass over them. Consequently the agents designated to perform the work ordered or authorized by Congress had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability.

To conclude: The plaintiff in error claims that, conceding the interest and property which the defendants in error had in these lands, there was not in them a title to "such kind of property as was susceptible of pecuniary compensation, within the meaning of the Constitution." What the Government took, and takes

under similar circumstances, was the public property. It is not going too far, maybe, to assert that no private property is taken at all. The private property under the grant is eclipsed when the necessity for public use is properly determined. How could there be a settlement of the value of the private property? By what rule could the measure of damage and injury be arrived at? All the land on all the coasts and tide waters of the country might be affected by the exercise of this necessary and sovereign and paramount power—paramount against States and individuals in exactly the same degree. And it is not extravagant to say that the power might be dangerously hurt and imperiled if it was subject to doubt or cavil or diminution.

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